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RE LIM AH HEE, EX P PERWIRA AFFIN BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
HAIDAR MOHD NOOR J
b [BANKRUPTCY NO: D5-29-840-96]
19 AUGUST 1997

BANKRUPTCY: *Act of bankruptcy - Application to set aside bankruptcy notice - Whether leave required from court to execute writ of execution*

c ***BANKRUPTCY:*** *Notice - Application to set aside - Whether interest statute-barred - Whether bankruptcy notice void*

The judgment debtor filed an application to set aside the bankruptcy notice issued by the judgment creditor. The senior assistant registrar dismissed the application and the judgment debtor filed an appeal. At the hearing of the d appeal, two preliminary objections were raised by the judgment debtor, ie, that: (i) leave was not obtained from the court to execute the writ of execution; and (ii) the interest incorporated in the bankruptcy notice was statute-barred and therefore the bankruptcy notice was void *ab initio* pursuant to s. 6(3) of the Limitation Act 1953 ('the Act'). The first objection was subsequently e withdrawn and the issue before the court was the recovery of arrears of interest in respect of the judgment debt.

Held:

f **[1]** Bankruptcy actions do not come within the meaning of writ of execution and there is no need to get leave under O. 46 r. 2 of the Rules of the High Court 1980.

[2] A bankruptcy action, like execution proceedings, is the taking of a further step in an existing action rather than the commencement of a new action. Thus, s. 6(3) of the Act which does not cover execution proceedings also g does not cover bankruptcy actions.

[3] The Act does not prohibit the payment of arrears of interest due on a judgment debt beyond the six years after they become due so long as the act of recovery is made before the expiry of the six-year period.

h **[4]** Consequently, the interest claimed was not statute-barred and the bankruptcy notice was not void *ab initio*.

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Cases referred to:
National Westminster Bank Plc v. Powney and Ors [1990] 2 WLR 1084 ***(refd)***
WT Lamb & Sons v. Rider [1948] 2 All ER 402 ***(refd)***
Re A Bankruptcy Notice [1898] 1 QB 387 ***(cit)***
Malaysia Soil Investigation Sdn Bhd v. Emko Holdings Sdn Bhd [1994] 1 CLJ 267 ***(foll)***
Re Ngan Ching Wen, Ex P Moscow Narodny Bank Ltd [1996] 2 CLJ 943 ***(dist)***

Legislation referred to:
Bankruptcy Rules 1969, r. 95
Companies Act 1965, s. 218
Limitation Act 1953, ss. 2(1), 6(3)
Rules of the High Court 1980, O. 46 rr. 1, 2(1)(a)
Limitation Act 1939 [UK], s. 2(4)
Limitation Act 1980 [UK], ss. 24(1), 38(1)
Rules of Supreme Court [UK], O. 42 r. 23

Other source referred to:
Limitation Periods, Andrew McGee, 1994, 2nd edn, p 60

For the judgment creditor - WM Lee; M/s Shook Lin & Bok
For the judgment debtor - M Manoharan; M/s Karpal Singh & Co

JUDGMENT

Haidar Mohd Noor J:

Lim Ah Hee @ Sim Ah Hee, the judgment debtor, filed an application by way of an affidavit to set aside the bankruptcy notice dated 28 March 1996 pursuant to r. 95 of the Bankruptcy Rules 1969 (encl. 4).

Perwira Affin Bank Berhad (formerly known as Perwira Habib Bank Malaysia Berhad), the judgment creditor, issued the bankruptcy notice dated 28 March 1996 (encl. 2) claiming a sum of RM6,388,344.68 as being the amount due on a final judgment obtained by it against the judgment debtor in the High Court at Kuala Lumpur on 23 October 1987 *vide* suit no. C-23-905-86. The particulars of the claim are:

1.	Judgment sum	RM2,963,054.86
2.	Interest at the rate of 16.5% per annum from 1.12.1985 to 28.3.1996 (3771 days)	RM5,051,115.56
		RM8,014,170.42

Less:

(1)	Proceeds from sale of shares under charging order – 5.2.1996	RM	375,119.20
	25.1.1996	RM	1,198,816.80
(2)	Garnishee Order		
	17.3.1993	RM	42,311.67
(3)	Others 30.10.1989	RM	3,000
	17.3.1990	RM	470.40
	30.7.1992	RM	2,960.10
	30.11.1992	RM	1,067.57
	21.9.1994	RM	2,000
	Amount due as at 28.3.1996	RM	6,388,344.68

The learned Senior Assistant Registrar on 19 March 1997 dismissed the judgment debtor's application with costs. He appealed against the said order to the High Court (encl. 16).

At the hearing of the appeal before me, Encik M Manoharan, the counsel for the judgment debtor raised two preliminary issues for my ruling first before considering the appeal proper. The two issues are:

(1) The judgment creditor has not obtained leave of the court to execute writ of execution in the case of where six years or more have lapsed since the date of the judgment or order pursuant to O. 46 r. 2(1)(a) of the Rules of the High Court 1980.

(2) Statute barred interest incorporated in the bankruptcy notice and therefore the bankruptcy notice is void *ab initio* relying on s. 6(3) of the Limitation Act 1953 (Act 254).

On issue (1) the counsel for the judgment debtor intimated that he would not be pursuing on it as he was satisfied that leave was obtained under O. 46 r. 2(1)(a) by the judgment creditor as shown subsequently by the counsel for the judgment creditor.

I will now proceed to consider issue (2) only.

Section 6(3) of the Limitation Act 1953 ('the Act') reads:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

There are two limbs to this provision, the first in relation to the enforcement of any judgment and the second with regard to the recovery of arrears of interest in respect of any judgment debt. We are here concerned with the second limb.

In so far as the first limb is concerned it would seem clear by the definition of the word 'action' in s. 2(1) of the Act that s. 6(3) of the Act applies only to the process of bringing an action upon a judgment. It does not extend to seeking execution of a judgment: the latter is a purely procedural step, and is not an "action" within the meaning of the Act and "action" is defined to include a suit or any other proceedings in a court of law.

Our Act is modelled on the English Limitation legislation.

In *National Westminster Bank Plc. v. Powney and Others* [1990] 2 WLR 1084, the court of Appeal held that an application to issue, or to extend the time, for execution under a judgment was not an 'action' within the meaning of s. 38(1) of the Act of 1980; and that, therefore, an application by the bank for the renewal of the existing warrant or the issue of a new one would not come within the provisions in s. 24(1) prohibiting the bringing of an action on a judgment after the expiration of six years from the date on which judgment became enforceable. The Court of Appeal cited with approval another Court of Appeal's case of *W.T. Lamb & Sons v. Rider* [1948] 2 All ER 402

No doubt in *W.T. Lamb's case,* the Court of Appeal was considering the respective antecedents of s. 2(4) of the Limitation Act 1939 and O. 42 r. 23 of the Rules of Supreme Court, however, it does provide a guidance to the interpretation of our s. 6(3) of the Act.

Section 2(4) of the Act of 1939 would appear to be in more or less similar terms as our s. 6(3) of the Act and reads:

> An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

According to Andrew McGee on *Limitation Periods,* 1994, 2nd Edition at p. 60, the effect of the judgment of *W.T. Lamb* is:

a There is a vital distinction between suing on a judgment and enforcing it. The former involves bringing an action and is subject to the 1980 Act, whereas the latter is purely procedural matter, to which the 1980 has no relevance.

This is what the Court of Appeal in *W.T. Lamb's* case said at pp. 409/410:

b It follows from the above brief survey that the right to sue on a judgment has always been regarded as a matter quite distinct from the right to issue execution under it and that the two conceptions have been the subject of different treatment. Execution is essentially a matter of procedure – machinery which the court can, subject to the rules from time to time in force, operate for the purpose of enforcing its judgments or orders. A refusal by the court, whether c before or after the passing of the Common Law Procedure Act, 1852, to place this machinery at a plaintiff's disposal in no way affected his right to sue on the judgment at any time within the statutory limit of time – as indeed was expressly recognised by the proviso to s. 130 of that Act. Counsel for the plaintiffs, however, as we understood him, said that, whatever may have been the position previously, a successful plaintiff is now entitled, by virtue of the d Limitation Act 1939 to issue execution at any time within twelve years of the judgment. He relied particularly on the definition of "action" in s. 31 of the Act and said that it is an extremely wide definition, and should be contrasted with such earlier definitions as that in s. 100 of the Judicature Act 1873, and s. 225 of the Judicature Act 1925. It is true that the definition of "action" in e s. 31 of the Limitation Act 1939, is wide, but we are unable to see how this fact gets the plaintiffs within measurable distance of the conclusion which they seek to found on it. The reason for including "any proceeding in a court of law" in the meaning of the word "action" is sufficiently apparent when one sees that many of the actions dealt with by the Act (e.g. foreclosure and redemption actions) are normally commenced by originating summons and not f by writ. No more weight can be attached to this definition than could have been attached to s. 40 of the Act of 1833 in which the words "action or suit or other proceeding" were prefatory to a number of different kinds of proceedings, some at common law, some in equity, and would require, accordingly, to be read distributively. The language of s. 2(4) of the Act of 1939 in itself is plain and re enacted existing law. To resort to the definition g section, not otherwise required, in order to show that the legislature were intending to blend together matters respectively of substantive law and of procedure which had never been blended before is to adopt what is to our mind, a bold but illegitimate course. The relevant provisions of the Real Property Limitation Acts 1833 and 1874, and of the Limitation Act 1939, dealt, in our opinion, with the substantive right to sue for and obtain a judgment, h and with that alone. The Common Law Procedure Act 1852, and RSC, O. 42, were concerned, and concerned alone, with procedural machinery for enforcing a judgment when obtained. The two subjects were formerly quite independent and distinct, the one from the other, and we are quite unable to attribute to the definition of "action" in the Limitation Act 1939, the effect of merging i the two together.

The matter before me relates to bankruptcy action taken by the judgment creditor. In my view, going by the meaning of "writ of execution" in O. 46 r. 1 of the Rules of the High Court 1980, bankruptcy actions do not come within the meaning of writ of execution and there may be no need even to get leave under O. 46 r. 2 to proceed with the bankruptcy actions. The issue of a bankruptcy notice is not a form of execution (see *Re A Bankruptcy Notice* [1898] 1 QB at p. 387.) (p. 764 of the Supreme Court Practice 1997, Vol. 1).

As seems clear to me that "action" under s. 6(3) of the Act does not cover execution proceedings and what more the bankruptcy actions, it follows therefore that the bankruptcy actions do not come within the ambit of s. 6(3) of the Act and is therefore not applicable.

As s. 6(3) of the Act refers to "actions on judgments" it would seem only sensible to interpret both limbs as applying in the same way, that is, confining to actions on judgments and excluding execution proceedings including bankruptcy actions. In my view the bankruptcy actions just like execution proceedings is the taking of a further step in an existing action rather than the commencement of a new action. In other words the bankruptcy actions do not operate on the concept of the cause of actions as is intended by the provisions of the Act.

However, assuming that I am wrong, and that there are separate rules for the principal sum and for the interest on the principal sum then I need to consider, the interpretation to be given to the second limb of s. 6(3) of the Act.

The local case on the interpretation of s. 6(3) of the Act, according to the counsel for the judgment creditor, is *Malaysia Soil Investigation Sdn. Bhd. v. Emko Holdings Sdn. Bhd.* [1994] 1 CLJ 267, a High Court decision.

The facts in *Malaysia Soil Investigation's* case and in this case are more or less similar though *Malaysia Soil Investigation's* case relates to petition for winding-up whereas this case relates to bankruptcy action.

The following are the facts in brief of *Malaysia Soil Investigation's* case.

The petitioner obtained a judgment in default of defence against the respondent on **17 August 1987** for RM73,019 together with interest thereon at the rate of 8% per annum from **20 May 1985** until full settlement and RM225 costs.

On **10 December 1992,** the petitioner issued a notice under s. 218 of the Companies Act 1965 demanding that the respondent pay the judgment sum together with interest of RM44,131.40 which the petitioner calculated from **20 May 1985** to **10 December 1992** and a further interest at the rate of 8% per annum from 11 December 1992 to the date of realisation.

a The notice gave the respondent the statutory three weeks within which to submit payment. The respondent failed to comply with the notice and on that ground it was deemed unable to pay its debts. On 1 April 1993 the petitioner served the respondent with the petition and thereafter proceeded to make the relevant advertisements both in the newspaper and the Government Gazette.

b On 4 June 1993, some five months after the expiry of the prescribed time set in the notice, the respondent tendered payment to the petitioner in the amount of RM85,260. The petitioner refused the tender on the ground that the amount tendered was not the right amount.

c In opposing the petition, the respondent relied, *inter alia,* on the ground that the interest on the judgment sum had been calculated for more than six years and as such the claim for interest contravened the provision of s. 6(3) of the Act.

d It was held by the learned judge that interest due on a judgment continues to be due until full payment is made. The Act certainly does not prohibit the payment of the arrears of interest due on the judgment debt beyond the six years after they become due as long as the act of recovery is made before the expiry of the six year period.

e In the case in question the judgment debt became due on 17 August 1987 and interest was due from 20 May 1985 and there was therefore a period of about two years and three months that the interest became due (17 August 1987 – 20 May 1985) and it was therefore well within the limitation period.

f Similarly here, the judgment debt became due on 23 October 1987 and the interest became due from 1 December 1985, a period of roughly one year and eleven months and it was therefore well within the limitation period. It follows that the Act does not prohibit the payment of arrears of interest due on a judgment debt beyond the six years after they become due so long as the act of recovery is made before the expiry of the six year period.

g I agree with the learned judge's interpretation of s. 6(3) of the Act and would in the circumstances rule that interest claimed is not statute barred and therefore the bankruptcy notice is not void *ab initio* as claimed by the counsel for the judgment debtor.

h With respect, I find that there are no merits in the argument of the counsel for the judgment debtor. Perhaps, if I may, I would say that his argument would tantamount to "blowing hot and cold" on the interpretation of the second limb of s. 6(3) of the Act. The case of *Re Ngan Ching Wen Ex parte: Moscow Narodny Bank Ltd.* [1996] 2 CLJ 943 relied on by him is of not much

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assistance as it seemed that the construction of s. 6(3) of the Act was not adequately considered by the learned judge. Had the case of *Malaysia Soil Investigation Sdn. Bhd. v. Emko Holdings Sdn. Bhd.* [1994] 1 CLJ 267 brought to his attention he may well have come to a different finding compared to the benefits which I had.

I will now invite counsel for the judgment debtor to submit on the merits of the judgment debtor's appeal if he still wishes to proceed in spite of my ruling.

Reported by Eugene Ong